# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

DEERE CREDIT, INC.,	)	
	)	
Plaintiff,	)	Case No. 4:03-CV-10381
	)	
v.	)	
	)	
GRUPO GRANJAS MARINAS, S.A. DE	)	ORDER
C.V., and SHRIMP CULTURE II, INC.	)	
	)	
Defendants.	)	

The Court has before it defendants' motion to dismiss or, in the alternative, to stay proceedings, filed September 10, 2003. Plaintiff resisted the motion on November 7, 2003. On December 9, 2003, defendants filed their reply. Plaintiff's filed a surreply on January 6, 2004 and on January 23, 2004 defendants filed a reply to plaintiff's surreply. The Court held a hearing on January 27, 2004. The motion is now fully submitted.

### I. BACKGROUND

The following facts are viewed in a light most favorable to plaintiff. This action centers on an agreement to purchase heavy dirt-moving equipment for use in a commercial shrimp farming operation in Venezuela. On or about October 26, 2001, plaintiff Deere Credit entered into an Agreement of Sale with Reservation of Title (the "Agreement") with a Venezuelan company, Inter Sea Farms de Venezuela, S.A. ("Inter Sea"). Under the Agreement, Inter Sea financed through plaintiff pieces of heavy equipment manufactured by Deere & Company, including, but not limited to, tractors,

excavators, and scrapers. Pursuant to the Agreement, defendants Grupo Granjas Marinas, S.A. de C.V. ("Grupo"), a Honduran corporation, and Shrimp Culture II, Inc. ("Shrimp Culture"), an U.S. corporation (collectively "defendants"), jointly and severally guaranteed Inter Sea's payment obligation to plaintiff.

Shortly after receiving delivery, Inter Sea began to experience various problems with the equipment. Inter Sea quit making payments on the equipment, and on or about July 9, 2003, plaintiff filed the present action ("Iowa action") seeking to enforce the guaranty provisions of the Agreement against defendants. The Agreement states:

Buyer's obligations under this Agreement are absolute, and will not be subject to diminution for any reason, including, without limitation, any breach of any obligation of Seller, whether by Seller or its assign(s), or of any manufacturer, dealer, or vender of any Equipment. Buyer waives and disclaims all claims, rights of set off, recoupment, counterclaim and deduction, and defenses, that Buyer may have against Seller.

Defendants' Motion to Dismiss, Appendix B, Agreement ¶ 2. Plaintiff alleges that Inter Sea is in material breach of the Agreement because it failed to make installment payments as required by the Agreement. On or about July 15, 2003, Inter Sea filed an action against plaintiff in Venezuela ("Venezuela action") alleging that the equipment purchased under the Agreement is defective and resulted in losses to Inter Sea's shrimp farming operation.

Defendants now move this Court to dismiss the Iowa action on the basis of *forum non* conveniens and/or improper venue, or in the alternative, to stay the Iowa action pending resolution of the Venezuela action.

### II. APPLICABLE LAW AND DISCUSSION

### A. Whether Venue is Proper in the Southern District of Iowa

Defendants first allege that venue in this Court is improper because Venezuelan law requires that this dispute be presented in Venezuela.<sup>1</sup> In the present case, however, the defendants expressly consented to the jurisdiction and venue of this Court. The Agreement, which it appears was negotiated between the parties<sup>2</sup> and executed by defendants, contains the following forum selection clause:

Buyer and each Guarantor irrevocably agree that any legal action with respect to any of its obligations arising under or related to any Transaction Document may be brought in any court of the State of Iowa, the U.S. District Court located in Des Moines, Iowa, U.S.A., in any court of the State of New York, in the U.S. District Court located in the borough of Manhattan, City of New York, New York, U.S.A., or in any Court of the Bolivarian Republic of Venezuela and, be execution and delivery of this Agreement, Buyer hereby irrevocably submits to the nonexclusive jurisdiction of all such courts; provided, however, that nothing herein shall preclude Seller, if it thinks fit, from instituting proceedings against Buyer and/or the Guarantors or either of them (either before, during the pendency of, or after any proceedings initiated in Des Moines, New York, or Venezuela) in any state, country or place that may have jurisdiction for the purpose of protecting and enforcing Seller's rights under any of the Transaction Documents, or any other agreements, documents, instruments or otherwise.

Defendants' Motion to Dismiss, Appendix B, Agreement ¶ 15 (emphasis added). Defendants now argue that this forum selection clause is not valid under Venezuelan law.

<sup>&</sup>lt;sup>1</sup> Paragraph 19 of the Agreement provides: "[t]his Agreement shall be governed by and construed in accordance with the laws of Venezuela, without giving effect to any conflict of law rules."

<sup>&</sup>lt;sup>2</sup> David Griffith, General Manager of Inter Sea claimed that he "reviewed and commented on the drafts [of the Agreement] and negotiated the terms on behalf of Inter Sea." Defendants' Motion to Dismiss, Appendix A, Griffith Affidavit ¶ 18.

### 1. Whether Forum Selection Clause Is Valid Under Venezuelan Law

Defendants point out that the Venezuelan Act on Private International Law, Chapter IX, Article 40 provides that Venezuelan courts shall have jurisdiction of cases involving contracts entered into or events that occurred in Venezuela. Defendants' Reply, Second Affidavit of H. Rubio ¶ 10; Defendants' Memorandum Supporting Motion to Dismiss at 11-12, footnote 7. The Venezuelan Act on Private International Law, Chapter IX, Article 47 also provides that parties may generally contract away their legal obligation to have disputes resolved in Venezuela. Defendants' Reply, Second Affidavit of H. Rubio ¶ 10. There is an exception to this rule is when issues of Venezuelan public policy are implicated by a contract. *Id.* When Venezuela public policy is implicated, parties may not contract away their legal obligation to have disputes resolved in Venezuela. *Id.* Thus, one of the primary issues in the present action is whether the Agreement implicates fundamental issues of Venezuelan public policy.

Defendants argue that users of goods are protected by the Venezuelan National Constitution.

Article 117 Venezuelan National Constitution provides:

All of the people must have the right to acquire goods and services of quality, as well as adequate and non deceptive information of the contents and characteristics of products and services to acquire, to the freedom of election and to an equitable, just and trustworthy treatment. The law will establish the necessary mechanism to guarantee those rights, the norms of quality control and amount of goods and services, the procedures to defend the consumer public, the corresponding compensation of the caused damages and sanctions by the violation of these rights.

Defendants' Reply, Second Affidavit of H. Rubio ¶ 10. Defendants allege all criteria established in the Constitution are matters of public policy. According to defendants it follows then that the Law of

Protection to the Consumer and User, which defendants contend is based on Article 117 of the Venezuela National Constitution, protects all users of goods as a matter of public policy. *See, e.g.*, Defendants' Memorandum Supporting Motion to Dismiss at 11-12, footnote 7; Defendants' Reply, Second Affidavit of H. Rubio ¶ 10. According to defendants, the forum selection clause enacted by the parities was invalid under the Venezuelan Act on Private International Law and thus in violation of Venezuelan public policy.

Essentially, it appears that defendants are asking this Court to find that it is unconstitutional under Venezuelan law for a Venezuelan purchaser to negotiate and enter into a contract that designates a forum outside of Venezuela for resolving disputes. Despite this claim, however, defendants do not cite any Venezuelan case law, any explicit legislation, or any other authority directly supporting this proposition. In the absence of some guidance from the Venezuelan courts or from Venezuela's legislative body, this Court is not willing conclude that Venezuela law prevents commercial enterprises, like those in the present case, from negotiating and entering into a contract that permits disputes to be resolved in a forum outside Venezuela.

Moreover, to hold the forum selection clause in the Agreement unenforceable would be to contradict express language in a contract that was negotiated and agreed upon by the parties. In the Agreement, the parities explicitly name "the U.S. District Court located in Des Moines, Iowa, U.S.A." as an appropriate forum to hear this case. Defendants' Motion to Dismiss, Appendix B, Agreement ¶ 15. The Court acknowledges defendants' argument that this provision in the Agreement appears

incompatible with ¶ 19, which designates Venezuelan law.<sup>3</sup> Defendants' Motion to Dismiss, Appendix B, Agreement ¶ 19. The Court also notes, however, that it is being asked to make a determination of Venezuelan constitutional law not yet considered by the Venezuelan courts. Under these circumstances, the Court feels that it is most appropriate to interpret the Agreement in such a way as to give effect to the express language as it was negotiated and agreed upon by the parties.

Accordingly, the Court finds the forum selection clause in the Agreement valid.

2. Whether Forum Selection Clause is Enforceable Under Federal Law

The parties appear to agree that Venezuela substantive law applies to the Agreement. *See* Defendants' Motion to Dismiss, Appendix B, Agreement ¶ 19. The parties do disagree, however, whether federal or Venezuelan procedural law governs the enforceability of the forum selection clause. While the Eighth Circuit "does not yet appear to have taken a definitive position" on the issue, *see M.B. Restaurants, Inc. V. CKE Restaurants, Inc.*, 183 F.3d 750, 752 (8th Cir. 1999), the Circuit has suggested that district courts give consideration to foreign procedural law if principles of foreign public policy are affected. *See Farmland Industries, Inc. v. Frazier Parrrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986). As mentioned before, in this case it does not appear that the Agreement implicated Venezuelan public policy. The Court will therefore analyze the enforceability of the forum selection clause under Federal procedural law.

Defendants allege that under federal law the forum selection clause is permissive and is

<sup>&</sup>lt;sup>3</sup> Article 48 of the Venezuelan Civil Code provides that: "[i]n matters of guarantors or guarantees, the appropriate court is that which is responsible for the principal case." *See* Defendants' Reply, Second Affidavit of H. Rubio ¶ 9.

therefore subject to a forum non-convenience analysis as set forth in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947). Plaintiff argues that the forum selection clause is mandatory, but points out that even if it is permissive, defendants waived their ability to argue forum non-convenience in paragraph 15 of the Agreement.

As previously mentioned paragraph 15 of the Agreement provides, in part:

Buyer and each Guarantor irrevocably waive any objection it may now or hereafter have to the laying of venue of any suit, action or proceeding relating to any of the Transaction Documents in Des Moines, the borough of Manhattan, or Venezuela, and, further, irrevocably waives any claim that Des Moines, the borough of Manhattan, or Venezuela is not a convenient forum for any such suit, action, or proceeding.

Defendants' Motion to Dismiss, Appendix B, Agreement ¶ 15.

Thus, under *M/S Brennen v. Zapata Off-shore Co.*, 407 U.S. 1 (1972) the forum selection clause, even if permissive, is valid and Iowa is a proper venue absent a strong showing that it should be set aside. *See also AAR International, Inc. v. Nimelias Enterprises S.A.*, 250 F.3d 510, 526 (7th Cir. 2001) (ruling that a permissive forum selection clause, when coupled with a waiver of forum non-convenience arguments, should be evaluated under stricter *M/S Brennen* standard, and not under a traditional forum non-convenience analysis).

Defendants have alleged, albeit halfheartedly, that the Agreement is a contract of adhesion and should therefore be set aside. *See* Defendants' Reply at 5-6, footnote 6. Defendants suggest that the parties were at disparate bargaining positions because there were only two viable options from whom to purchase the equipment. As plaintiff points out, however, David Griffith, General Manager of Inter Sea admitted that he "reviewed and commented on the drafts [of the Agreement] and negotiated terms

on behalf of Inter Sea." Defendants' Motion to Dismiss, Appendix A, Griffith Affidavit ¶ 18. Nothing in the record now before the Court convinces it that the forum non-convenience clause should be set aside. Accordingly, the Court finds that the Agreement is not an adhesion contract. Further, the Court finds the forum selection clause valid and enforceable, and thus finds that Iowa is a proper venue to consider plaintiff's claim.

B. Whether Iowa Action Should be Stayed Pending the Conclusion of the Venezuelan
 Action

Defendants argue as an alternative to dismissal, that the Court should stay this action pending a decision in the Venezuelan action because the critical issue in both cases is whether Inter Sea is in breach of the Agreement. Defendants assert that under Venezuelan law, Inter Sea – the principal debtor – is excused from performance if the other party to the contract, in this case plaintiff, fails to perform. *See* Article 1,168 of Venezuelan Civil Code ("in bilateral contracts each party can deny the execution of an obligation if the other party has not complied their obligation."). As guarantors to the Agreement, defendants contend that they may also assert the same defenses as the principal debtor. *See* Defendants' Reply, Second Affidavit of H. Rubio ¶ 12, Article 1,832 of Venezuelan Civil Code ("The guarantor may oppose the creditor all the exceptions which pertain to the principal debtor and these are not personal."). Defendants argue that pursuant to Venezuelan law, neither Inter Sea or defendant, as guarantors, were obligated to continue to make payments to plaintiff because the equipment was defective. According to defendants, the issues to be determined in both the Venezuelan and Iowa actions are thus the same; whether the equipment was defective.

The parties to the original contract, however, appear to have addressed this matter in Section

2(c) of the Agreement. Section 2(c) provides:

Buyer's obligations under this Agreement are absolute, and will not be subject to diminution for any reason, including, without limitation, any breach of any obligation of Seller, whether by Seller or it assign(s), or any manufacturer, dealer, or vendor of any Equipment. Buyer waivers and disclaims all claims, rights of set off, recoupment, counterclaim, and deduction, and defenses, that Buyer may have against seller.

Defendants' Motion to Dismiss, Appendix B, Agreement ¶ 2. Plaintiff argues that defendants have expressly waived any rights to withhold payment based on problems with the equipment.

Defendants respond that Article 8 of the Law of Protection to the Consumer and User renders this waiver in Section 2(c) invalid. Article 8 provides the following: "The rights of the consumers and users consecrated in *this Law* are irrevocable. It is considered null the stipulations that established the resignation to such rights or the commitment of not exerting them in administrative or jurisdictional instances." *See* Defendants' Reply, Second Affidavit of H. Rubio ¶ 12 (emphasis added). Defendants argue that under Article 8 the aforementioned protections afforded by the Venezuelan Civil Code cannot be contracted away. *See* Defendants' Reply at 1-2; *See also* Defendants' Reply, Second Affidavit of H. Rubio ¶ 12. Article 8 of the Law of Protection to the Consumer and User prohibits parties from contracting away rights protected by "this Law". The Court interprets this language as referring to the Law of Protection to the Consumer and User; not the Venezuelan Civil Code. Nothing in the record convinces the Court that rights under Articles 1,168 and 1,832 of the Civil Code cannot be contracted away.

It appears, at least at this stage in the litigation, that the parties to the original contract contracted around these provisions in the Civil Code, and there is no basis for finding Section 2(c) of

the Agreement is not valid and enforceable under Venezuelan law. Thus, the issue in the present action appears to be limited to whether defendants are liable for Inter Sea's failure to make payments under the Agreement irrespective of the performance of the equipment. That being the case, the Iowa and Venezuelan actions present different issues and the outcome of this action is not dependant on the issue currently before the Venezuelan court; whether the equipment was defective in breach of the Agreement. Accordingly, the Court will not stay the present action at this time.

## III. CONCLUSION

For the reasons set forth above, defendants' motion to dismiss, or in the alternative, to stay the proceedings is DENIED.

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IT IS ORDERED.

This 3rd day of March 2004.